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In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 318

SOUTH BUFFALO RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SEC-  
OND CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 90-98) is reported at 71 F. Supp. 461. The findings of fact and conclusions of law of the District Court appear at R. 98-105. The opinion of the Court of Appeals (R. 116-123) is reported at 168 F. 2d 948.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1948 (R. 124). The petition for a writ of certiorari was filed September 28, 1948.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

**QUESTION PRESENTED**

Whether a two-mile haul by a locomotive of 15 freight cars as a unit, during which no cars are picked up or set out en route and the movement is uninterrupted, is a train movement within the requirement of the Safety Appliance Act that a minimum percentage of cars in a train have power or train brakes subject to the control of the engineer.

**STATUTES AND REGULATION INVOLVED**

The Act of March 2, 1893, c. 196, 27 Stat. 531, commonly known as the Safety Appliance Act, provides in pertinent part:

[Sec. 1 (45 U.S.C., 1946 ed., 1)] \* \* \* it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic \* \* \* that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

\* \* \* \* \*

Sec. 6 [45 U.S.C., 1946 ed., 6]. \* \* \* any such common carrier using any locomotive engine,

running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed \* \* \*.

\* \* \* \* \*

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provides in pertinent part:

\* \* \* \* \*

Sec. 2 [45 U.S.C., 1946 ed., 9]. \* \* \* Whenever, as provided in said Act [of March 2, 1893, *supra*], any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate-Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said

Interstate-Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

\* \* \* \* \*

An order of the Interstate Commerce Commission, dated June 6, 1910 (49 C.F.R. 132.1), provides:

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

#### STATEMENT

Pursuant to Section 6 of the Safety Appliance Act of March 2, 1893 (*supra*, pp. 2-3), the United States filed a complaint (R. 3-11) in the District Court for the Western District of New York charging petitioner, a common carrier engaged in interstate commerce by railroad, with violations of certain safety appliance provisions of that Act, as amended, and asking judgment in the sum of \$100 for each violation. Ten violations were alleged, but only two, the third and the sixth, are here involved, the other eight causes of action, or counts, having been disposed of by confession of judgment (R.

13-14). In the third cause of action (R. 5-6), it was alleged that petitioner, on December 4, 1944, operated over its line of railroad, from Buffalo, New York, to Lackawanna, New York, a train consisting of a locomotive and 15 cars, the brakes in only ten of which cars (less than 85%) were used and operated by the engineer of the locomotive, in violation of Section 2 of the Act of March 2, 1903 (*supra*, pp. 3-4), as modified (pursuant to authority conferred by the section) by the order of the Interstate Commerce Commission of June 6, 1910 (*supra*, p. 4). The sixth cause of action (R.7-8) charged that petitioner, on December 5, 1944, operated from Lackawanna to Buffalo a train consisting of a locomotive and 15 cars, the brakes in none of which cars were used and operated by the engineer of the locomotive, in violation of the same provisions of law.

Petitioner admitted the interstate character of its business, but otherwise denied the allegations of the third and sixth causes of action (R. 12.) Following a trial before a judge, a jury having been waived, judgment was entered for petitioner (R. 105), the court finding that the movements involved were "switching movements and not train movements," and hence not subject to the provisions of law alleged to have been violated (R. 104). On appeal by the United States to the Court of Appeals for the Second Circuit, the judgment of the district court was reversed (R. 124) on the ground

that in each instance the movement in question was "a transfer of cars from one switching point to another and itself is a train movement \* \* \* rather than a switching operation" (R. 120).

The controlling facts, which are not in dispute, are summarized in the following excerpt from the opinion of the district court (R. 92-93; see also the court's numbered finding of facts, R. 98-104) :

The third cause of action relates to the movement by the defendant in the afternoon of December 4, 1944, of a cut of cars consisting of 15 freight cars drawn by its yard engine from a point opposite the Buffalo Sintering Corporation buildings, at Buffalo, N. Y., to the yard near the Bethlehem Steel Company's plant at Lackawanna, a distance of about two miles. It is not denied that only the first ten cars, or less than 85% of the total 15, had their air brakes used and operated by the locomotive engineer. No cars were picked up or set out en route.

The sixth cause of action involves an operation in the afternoon of December 5, 1944, of another cut of cars also consisting of 15 freight cars and drawn by a yard engine in direction reverse from that described in the third cause of action, *i.e.* from opposite the police guard building at Lackawanna to defendant's Marilla Street yard opposite the Buffalo Sintering plant. It is not denied that none of these cars had their air brakes used and operated by the engineer; that no cars were picked up or set out in the movement, and in the move-

ment defendant passed over one private highway crossing at grade.<sup>1</sup>

In both instances the cars were assembled at one point in defendant's yard and removed intact to another point in the yard over a single track line connecting these points.<sup>2</sup> It seems to be undenied that the defendant's whole system includes only a single yard.<sup>3</sup>

The undisputed facts are that switching cars is the sole business of the defendant; its trains are used only in switching service; its entire equipment, with possible exception of a few cars, is suitable only for use in switching service; no public streets, highways or tracks of other railroads are crossed at grade in any of the movements complained of herein, except one private industrial crossing owned by the Bethlehem Steel Company and restricted in its use to the latter's employees and others to whom permission is given by such company to pass into the Company's property; these movements on the track are effected by switching engines; they are under the supervision and

<sup>1</sup> This private highway crossing was also crossed, according to the undisputed evidence, in the movement of December 4, 1944, involved in the third cause of action (R. 20, 25).

<sup>2</sup> According to the undisputed evidence (see findings of fact 15 and 17, R. 101-102, 103-104), the movements in controversy were preceded and followed by switching operations; i.e., in each instance, the 15-car train was made up by assembling cars from various locations, and was subsequently broken up by setting the cars off at various other locations.

<sup>3</sup> This is not accurate, though the point is not considered relevant; according to the Government's witnesses, I.C.C. inspectors with more than 30 years' railroad experience (R. 17-18, 26), the terminal points of the movements in issue were in separate yards of petitioner (R. 20, 28-29).

control of the yard master and crews; the movements are not made under train order or time table schedules; there is no block system; the movements are made at slow speed<sup>4</sup> during which a member of the crew is stationed at the forward end of the locomotive in order to watch the track ahead.

#### ARGUMENT

It is well settled that the requirement of the Safety Appliance Act, as amended and modified, *supra*, pp. 2-4, that not less than 85% of the cars of a train be equipped with power brakes under the control of the engineer, applies only to true train movements and not to "mere switching operations." *United States v. Northern Pacific Ry. Co.*, 254 U. S. 251, 254-255; *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, 537-540; *United States v. Chicago, Burlington & Quincy R. R.*, 237 U. S. 410, 412-413; *United States v. Erie R. R.*, 237 U. S. 402, 406-408. The difference between a train movement and a switching operation is generally clear, but it is evident that there is a middle ground in which it is difficult to draw the line between the two types of operation. In this case, the district court, accepting petitioner's contention, held the movements in controversy to be

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<sup>4</sup> The average speed of both movements in question was approximately five miles per hour (R. 101, 103). The movements were not, however, on level ground. Approximately one mile of the distance traversed in each movement consisted of a grade, described as "very heavy" by a government witness (R. 27) and as "slight" by a defense witness (R. 62).

mere switching operations. The Court of Appeals drew the contrary conclusion from the same facts, and accepted the Government's contention that the movements were true train movements. Since the controlling facts are not in dispute and the issue is essentially legal rather than factual, the Court of Appeals was, of course, in as good a position as the district court to make the legal determination. We submit that the Court of Appeals' decision that the movements were train movements rather than switching operations is clearly correct under the decisions of this Court.

Petitioner points to numerous factors which, it contends, show that the movements in question must be considered as mere switching operations (Pet. 6-11). Thus, it argues, it is "wholly within the Buffalo Switching District"; its services are limited to "switching services" in an area six miles long by three miles wide; it is classified for accounting purposes as a switching carrier; all of its crews are yard crews; through trains do not pass over its tracks; none of its movements is made under train orders or on time-table schedules; no public streets or other railroad tracks were crossed in the two movements in question; the average speed in each instance was only five miles per hour; visibility along the entire route was unobstructed; payment was received for the operations on the basis of one switching charge per car; the cars involved in each operation were assembled from various points prior

to the commencement of the run in issue, and at the end of the run were cut out and set off on various tracks; etc.

We submit, however, that such factors as those enumerated are not relevant to the issue of whether the movements in question were train movements or "mere switching operations." Indeed, the fact that true switching operations preceded and followed the movements in controversy serves but to emphasize the different nature of the latter as true train movements. The controlling fact in this case is that in each instance there was a two-mile haul by a locomotive of 15 cars as a unit, during which no cars were picked up or set out en route and the movement was uninterrupted. Under the decisions of this Court, these movements were train movements within the meaning of the provisions of law involved.

In *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U. S. 534, at 538, the Court said:

An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptance of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when this Safety Appliance Act was passed twenty-six years ago, and even yet, probably, exceeds in length, pas-

senger and freight trains considered, more than a majority of the regular road trains in this country.

The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.<sup>5</sup>

And in *United States v. Northern Pacific Ry. Co.*, 254 U. S. 251, at 254-255, the Court said:

\* \* \* A moving locomotive with cars attached is without the provision of the act [Safety Appliance Act] only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. \* \* \*

To the same effect, as to what constitutes a train movement as distinguished from a switching operation, see *United States v. Chicago, Burlington & Quincy R. R.*, 237 U. S. 410, 412, and *United States v. Erie R. R.*, 237 U. S. 402, 407-408.<sup>6</sup>

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<sup>5</sup> The distance traversed in that case was only three-quarters of a mile. In the present case, it was nearly two miles.

\* See also *United States v. Southern Pacific Co.*, 100 F. 2d 984 (C.C.A. 9), certiorari denied, 307 U. S. 633; *United States v. Southern Pacific Co.*, 60 F. 2d 864 (C.C.A. 9), certiorari denied, 287 U. S. 667; *United States v. Northern Pacific Ry. Co.*, 54 F. 2d 573 (C.C.A. 9); *Chicago, St. Paul, M. & O. Ry. Co. v.*

It is true, as observed by the Court of Appeals (R. 122), that these decisions "involved not only the transfer of cars as a single unit but also certain accompanying hazards on the route, which were somewhat different from and perhaps greater than those in the case at bar."<sup>7</sup> But it is clear that the degree of the danger resulting from failure to comply with the mandatory requirements of the law has not been considered by this Court as relevant. "Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented." *United States v. Northern Pacific Ry. Co., supra*, at 255.<sup>8</sup> In any event, as the Court of

*United States*, 36 F. 2d 670 (C.C.A. 8); *Chicago & Erie R. Co. v. United States*, 22 F. 2d 729 (C.C.A. 7); *Illinois Central R. Co. v. United States*, 14 F. 2d 747 (C.C.A. 8), certiorari denied, 273 U. S. 752; *Great Northern Ry. Co. v. United States*, 297 Fed. 692 (C.C.A. 9); *Great Northern Ry. Co. v. United States*, 288 Fed. 190 (C.C.A. 8); *United States v. Galveston, H. & H. R. Co.*, 255 Fed. 755 (C.C.A. 5); *United States v. Northern Pacific Ry. Co.*, 72 F. Supp. 528 (D. Minn.).

<sup>7</sup> In the *Louisville & Jeffersonville Bridge Co.* case, the movement in question involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of 2600 feet (249 U. S., at 538); in the *Northern Pacific Ry. Co.* case, the movement was across two streets and the lines of three independent railroad companies, one of which was a passenger-train track (254 U. S., at 253); in the *Chicago, Burlington & Quincy R. R.* case, the movement was partly along a main-line track accommodating passenger and freight trains (237 U. S., at 411); and in the *Erie R. R.* case, the movement crossed passenger train tracks and was partly along a main-line freight-train track (237 U. S., at 405).

<sup>8</sup> Compare: "But the construction which the act should receive is not to be found in balancing the dangers which

Appeals further observed (R. 122-123), there is "no essential difference \* \* \* between a public crossing and the private way in the present case; indeed, a public crossing might have less traffic than the private one which intersected defendant's line. \* \* \* Nor is it reasonable to say that the existence of more than one crossing is necessary in order to create sufficient hazards to render the Act applicable. We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance[s] would insure increased protection. In the record before us there was testimony by an experienced interstate commerce inspector [see R. 20] that the crossing and the existing grade at that point rendered the absence of air brakes dangerous. We can discover nothing in the testimony to justify a contrary conclusion unless it be the slow speed of the freight cars which were found to run at an average of five miles an hour; but there might be a higher speed on particular occasions."

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would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carelessness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act." *Louisville & Jeffersonville Bridge Co. v. United States*, *supra*, at 539.

Petitioner (Pet. 14-20) heavily relies on *United States v. Great Northern Ry. Co.*, 73 F. 2d 736 (C.C.A. 9), certiorari denied, 295 U. S. 752, where it was held, one judge dissenting, that a 1½-mile haul of twelve cars, with no setting out or picking up of cars en route, was a mere switching operation. The evidence in that case showed that, after the run in question, one of the twelve cars was set off and another substituted, following which the air brakes were connected up and the train proceeded another six miles. The court thought that this latter evidence indicated that the 1½-mile run was essentially a switching operation. The decision, however, cannot be reconciled with the decisions of this Court, discussed above, and, indeed, cannot be reconciled on any valid basis with prior and subsequent decisions of the same court. See *United States v. Southern Pacific Co.*, 60 F. 2d 864 (C.C.A. 9), certiorari denied, 287 U. S. 667, and *United States v. Southern Pacific Co.*, 100 F. 2d 984 (C.C.A. 9), certiorari denied, 307 U. S. 633.\* It must be regarded, therefore, as inconsistent with the decisions of this Court, those of other Courts

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\* In the *Southern Pacific Co.* case reported at 100 F. 2d 984, the Ninth Circuit attempted to distinguish its *Great Northern Ry. Co.* decision on the ground that in the latter case "the movement complained of took place entirely within the railroad yard, where no problem of avoiding interference in the use of tracks by speedy main line train movements could be encountered" (100 F. 2d, at 988). But in *United States v. Northern Pacific Ry. Co.*, 254 U. S. 251, 254, this Court had pointed out that "there is nothing in the act which limits the application of the provision here in question to operations on main line tracks."

of appeals (see note 6, *supra*, pp. 11-12), and prior and subsequent decisions in the same circuit. The other decision relied on by petitioner (Pet. 20-21), *United States v. New York, Chicago & St. L. Ry. Co.*, 77 F. 2d 215 (C.C.A. 7), involved a non-continuous movement featured by several stoppings and startings and opening and closing of switches, in which the engine was backing up throughout. In the case at bar, on the other hand, the trip was a continuous and uninterrupted haul of nearly two miles. The distinction between the movements seems apparent.

#### CONCLUSION

The decision below involved merely the application, in a specific factual situation, of principles laid down by numerous decisions of this Court, and is in accord with those decisions. There is, moreover, no real conflict among the circuits. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,  
*Solicitor General.*  
ALEXANDER M. CAMPBELL,  
*Assistant Attorney General.*  
ROBERT S. ERDAHL,  
PHILIP R. MONAHAN,  
*Attorneys.*

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